creates a precedent does not *ipso facto* say that it is a judgment fit for appeal. On that hypothesis every judgment is a judgment fit for appeal.

The Municipality will have just to wait. If they win in the long run they will have nothing to complain of. If they lose in the long run they can raise everything involved elsewhere.

In the meantime the application is dismissed with costs.

Application dismissed.

Solicitors: *Donaldson & Burkinshaw; Braddell & Ramani.*

Re SYED AHMED HOOD ALSAGOFF DECD.,

[C.A. (Rose C.J., Tan Ah Tah and Chua JJ.)
April 12, 1961]

[Singapore — Civil Appeal No. 27 of 1960]

Trusts and Trustees — Defaulting trustee — Order for payment into Court — Non-compliance — Writ of attachment — Principles on which writ issued — Debtors Ordinance (Cap. 13), s.10.

Costs — Relevant authorities not cited — Order as to costs.

The respondents obtained an order of Court that the appellant should pay $92,240.23 into Court, which order was not complied with. The respondents then applied by motion to the Court for liberty to issue a writ of attachment against the appellant.

Held: (1) having regard to the consideration that sending a person to prison for such a cause is a serious matter affecting the liberty of the subject, great care should be taken by the Court to be satisfied that the money in question has been in the actual possession or control of the person against whom it is sought to issue a writ of attachment, and that mere constructive receipt by an agent or solicitor on his behalf who may never have accounted is not enough;

(2) if the monies were under the actual control of the defendant or may have been received on his behalf by an agent who had not accounted, then leave to issue a writ of attachment should not be granted;

(3) in the present case there is an element of doubt which must be resolved in favour of the appellant;

(4) as the relevant authorities which have determined the appeal were not cited to the Court, there would be no order as to costs either in the Court of Appeal or in the Court below.

[Editorial Note: It would appear that *Yeoh Kok Keng & Ors.* v. *Yeoh Kok Ann* (1919), 15 S.S.L.R. 159, C.A. was also not cited to the Court. There it was decided that it is necessary, before the Court can exercise its power of imprisonment against a defaulting executor, that there must be an order to pay, default in payment and a judgment debt arising through the default. In other words, a judgment based upon the order to pay is necessary.

Further, the judgment debt necessary to found proceedings against the executor must comprise only sums which are or have been in his possession or under his control. It must not include sums for interest or costs.

The default alleged must be in obeying an order to pay a sum certain. Elementary principles of justice require that a man who is in danger of being sent to prison for non-payment of a sum of money should be definitely informed beforehand what is the exact sum in respect of which he is being charged.]

Cases referred to:—

(1) *Marris* v. *Ingram* (1879) 13 Ch. D. 338.
(2) *In re Fewster* [1910] 1 Ch. 447.
(3) *In re Wilkins* [1901] W.N. 202.
(4) *In re Underwood* (1903) 51 W.R. 335.
(5) *In re Weatherley* (1919) 88 L.J. K.B. 482 at p. 486.
(6) *Petty* v. *Daniel* (1886) 34 Ch. D. 172 at p. 181; 56 L.J. Ch. 192 at p. 195.
(7) *Evans* v. *Noton* (1892) 9 T.L.R. 108 at p. 109.
(8) *In re Wilde* [1910] W.N. 128.

COURT OF APPEAL.

Miss J. G. Smith for the appellant.

Y. R. Jumabhoy for the respondents.

Rose C.J.: This is an appeal from an Order made by the learned trial Judge on a Motion on behalf of the plaintiffs/respondents for liberty to issue a Writ of Attachment against the defendant/appellant.

It is common ground that the respondents obtained an Order that the appellant should pay $92,240.23 into Court and that the Order has not been complied with. It is also not in dispute that the appellant was at all material times acting in a fiduciary capacity.

The question raised on this appeal is whether it was sufficiently proved that the monies in question were in the appellant's possession or under his control, within the meaning of section 10 of the Debtors Ordinance (Cap. 13).

The relevant part of section 10 reads as follows:—

"10. Where the Court is satisfied that there has been default by a trustee or person acting in a fiduciary capacity in payment into Court of any sum in his possession or under his control, the Court may commit such trustee or person to prison for a term which may extend to six months."

The learned trial Judge relied on the case of *Marris* v. *Ingram*(1). Unfortunately, as learned counsel for the appellant concedes, he was not referred to two subsequent and very relevant cases, namely, *In re Fewster; Herdman* v. *Fewster*(2) (which was followed in the same year by *In re Wilkins; Emsley* v. *Wilkins*(3) and *In re Underwood*(4).

The principle enunciated in those cases would seem to be that having regard to the consideration that sending a person to prison for such a cause is a serious matter affecting the liberty of the subject, great care should be taken by the Court to be satisfied that the money in question has been in the actual possession or control of the person against whom it is sought to issue a writ of attachment, and that mere constructive receipt by an agent or solicitor on his behalf who may never have accounted is not enough. Moreover, if the position upon a consideration of the affidavits is consistent with either view, namely, that the monies either were under the actual control of the defendant or may have been received on his behalf by an agent who had not accounted, then leave to issue a writ of attachment should not be granted.

In the light of these principles it would seem to be clear that in the present case, having regard to the nature of the affidavits produced, there is an element of doubt which must be resolved in favour of the appellant.

I would add that on the general question of committal to prison on account of a failure to comply with some requirement of a civil statute or rule Scrutton L.J. in *In re Weatherley*[5], said at page 486 :—

"I desire to say at once that I approach this case in a somewhat different attitude of mind from counsel for the respondent, who proposed a view which I think we should be slow to adopt in dealing with a case involving a question of the liberty of the subject. No doubt he has the support of the observation of Kay J. in *Petty* v. *Daniel*,[6] where he said: 'Much has been said to me about the liberty of the subject, but I have not much respect for the liberty of the subject who deserves to be in prison.' That is a dangerous principle; and I much prefer that which was expressed in *Evans* v. *Noton*[7] by Bowen L.J. in these words: 'every subject of Her Majesty has a right to say that he ought not to be put in prison unless every iota of the rules had been satisfied'; and was, in effect, repeated in *Wilde, In re*,[8] where Cozens-Hardy M.R. said that 'the Court could not be too strict in matters affecting the liberty of the subject, ...' I find no exception made there of proceedings against a solicitor."

As the relevant authorities which have determined this appeal were not cited to the learned Judge — nor indeed was any point made concerning the principles enunciated in them, the main argument having been confined to the point as to whether the appellant was acting in a fiduciary capacity — we intimated at the conclusion of the hearing of the appeal that while the appeal must be allowed there would be no order as to costs either here or below.

Tan Ah Tah and Chua JJ. agreed.

Appeal allowed.

Solicitors *Donaldson & Burkinshaw; Mallal & Namazie.*

NEW MALAYA CO. LTD. v. ABU BAKAR

[O.C.J. (Adams J.) April 17, 1961]

[Muar — Civil Suit No. 49 of 1960]

Practice and Procedure — Costs — Security for costs — Plaintiff ordinarily resident out of jurisdiction — O.65 r.6A — Whether movable property consisting of office furniture and fittings and sundry debtors can provide adequate security.

Practice — Order made in Chambers — Whether can be reconsidered before it is drawn up and issued.

The defendant in this case sought for an order under O.65 r.6A that the plaintiff be ordered to provide security for costs. The plaintiff, a company incorporated in Singapore, had no immovable property in the Federation, but had a branch office in Kuala Lumpur. Its managing director in his affidavit deposed that the value of furniture and fittings and sundry debtors in the Federation amounted to $50,000.00, but did not say how much of that sum was represented by sundry debtors.

Held: (1) the registration in Singapore of a judgment issued by the Supreme Court of the Federation of Malaya is a process which involves a judicial officer being put in motion and which may be the subject of dispute and is therefore not automatic;

(2) movable property consisting of office furniture and fittings and sundry debtors in the Federation amounting to $50,000.00 can scarcely be said to provide adequate security to see to it that if the defendant were successful he would not be denied the remedy of enforcing the order for costs against the plaintiff;

(3) since the normal practice where the plaintiff is resident abroad is to order the plaintiff to give the defendant security for costs the application must be granted.

A Judge can reconsider his order made in Chambers before it is drawn up and issued.

Cases referred to:—

(1) *Coldham* v. *Raub Australian Gold Mining Co. Ltd.* [1940] M.L.J. 51.

(2) *Ng Hui Lip & Anor.* v. *Chan Hwa Cheng & Ors.* [1958] M.L.J. 57.

(3) *In re Harrison's Settlement* [1955] Ch. 260; [1955] 2 W.L.R. 256; [1955] 1 All E.R. 185.

APPLICATION BY SUMMONS IN CHAMBERS.

H. N. McLeod for the plaintiff.

R. Ramason for the defendant-applicant.

Cur. Adv. Vult.

Adams J.: This was an application by Summons in Chambers by the defendant residing at 22 Jalan Penggaram, Batu Pahat, for an order under Order 65 r.6A that the plaintiff be ordered to provide security for costs. Mr. Ramason appeared for the applicant/defendant and Mr. McLeod for the plaintiff.

The action is one for the price of goods sold and delivered, namely live sheep which it is alleged were delivered to the defendant between December 1959 and August 1960. The defendant disputes the amount owing.

The plaintiff company is a company incorporated in the State of Singapore and although it is alleged that the plaintiff company have a branch in the Federation of Malaya at 28 Brickfields Road, Kuala Lumpur, the managing director's affidavit sworn on the 22nd March, 1961, does not say that the plaintiff company are the owners of the premises nor does he say that the plaintiff company is the owner of any immovable property whatsoever in the Federation.

When the matter was argued before me in Chambers I refused the application on the authority of *Coldham* v. *Raub Australian Gold Mining Co. Ltd.*[1] which was cited to me by Mr. McLeod. But before the end of Chambers Mr. Ramason asked me to reopen the matter as he had failed to bring to my attention the much more recent case of *Ng Hui Lip & Anor.* v. *Chan Hwa Cheng & Ors.*[2] in which Smith J. refused to follow the decision in the *Coldham case.* He submitted that I had powers to do so citing *In Re Harrison's Settlement*[3] as authority. I said that I would adjourn the matter to open Court which I did. The matter was then further argued.

Mr. McLeod objected on the grounds that I had already made the order but I clearly have power to reconsider before the order is drawn up and issued.